90-308

Supreme Court, U.S.
FILED
AUG 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

John C. Pritchard,

Petitioner,

v.

National Transportation Safety Board,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD
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Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether the National Transportation Safety Board abused its discretion and violated the principles established in ***Accardi v. Shaughnessy***, 347 U.S. 260 (1953), by setting the date of entry of its orders in a manner contrary to the Board's own Rules of Practice.

2. Whether the court of appeals improperly dismissed petitioner's Petition for Review, as untimely filed, when that petition was filed within the sixty (60) day statutory time limit set within the Federal Aviation Act (49 U.S.C. Section 1486(a)) as further defined by the Rules of Practice of the National Transportation Safety Board (49 C.F.R. Section 821.64).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner John C. Pritchard hereby requests that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit, issued on June 5, 1990, wherein the court of appeals dismissed Pritchard's Petition for Review of an Order of the National Transportation Safety Board.

OPINIONS BELOW

The Opinion and Order of the National Transportation Safety Board in the underlying case is reported in a 'Slip Opinion' as EA-3024 (App. C). The Order of the United States Court of Appeals for the Ninth Circuit, dismissing Petitioner Pritchard's Petition for Review, is unreported (App. A). The Order of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Motion to Reconsider, is unreported (App. B). The appeals court docket number is 90-70041.

JURISDICTION

The order of the court of appeals dismissing Petitioner Pritchard's Petition for Review was entered on June 5, 1990. (App A). The order of the court of appeals denying reconsideration was entered on June 27, 1990. (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C.

Section 1254(1) as provided within the Federal Aviation Act (49 U.S.C. Section 1486(f)).

STATUTES INVOLVED

This petition concerns the proper interpretation of Section 1006(a) of the Federal Aviation Act of 1958 (49 U.S.C. Section 1486(a)) in light of the Rules of Practice of the National Transportation Safety Board, wherein, the Board has defined and established a policy for setting the date of entry of its orders (49 C.F.R. Sections 821.64, 821.7(f), 821.8(a), 821.8(d), and 821.8(e)). The applicable statute and regulations are fully set forth and presented in the appendix (App. H).

STATEMENT OF THE CASE

This petition raises issues of widespread importance in the area of administrative law and concerns fundamental '*due process*' rights established by statute and within the provisions of federal agency rules. The petitioner asks that the Court exercise its power of supervision due to the wide departure of the appeals court from the accepted course of judicial proceedings and from the applicable decisions of the Court (S.Ct. Rule 17.1).

The petition here arises as the result of the dismissal, as untimely filed, of Petitioner Pritchard's Petition for Review to the court of appeals wherein he sought review of an order of the National Transportation Safety Board. That order affirmed the suspension of Pritchard's Airline Transport Pilot certificate. The Petition for Review was filed within the sixty (60) day statutory limit, from date of entry of the Board's order, as set forth

within the Federal Aviation Act and as further defined within the Board's own Rules of Practice. However, in establishing the date of entry of its order for the purposes of seeking dismissal of Pritchard's Petition for Review, the Board arbitrarily set the date of entry of its order in a manner other than by the procedure specified within the Board's Rules of Practice (49 C.F.R. Part 821). And thus, the Board and the court of appeals violated the doctrine established by the Court in *Accardi v. Shaughnessy*, 347 U.S. 260 (1953).

Section 1006(a) of the Federal Aviation Act (49 U.S.C. Section 1486(a)) (App. H) provides that orders of the National Transportation Safety Board shall be subject to review by the courts of appeal upon petition filed within sixty (60) days of date of entry of the Board's order. And Section 821.64 of the Rules of Practice of the National Transportation Safety Board (49 C.F.R. Section 821.64) (App. H) states that, for the purposes of such a petition for review, the **date of entry** of the Board Order is the **date** on which the **ORDER IS SERVED**. Board rules further specify the requirements of proper service in Section 821.8 (49 C.F.R. Section 821.8) (App. H) where the rules state (Section 821.8(a)) that Board orders shall be served upon all parties by certified mail to the person specified to receive such service (Section 821.8(d)) at the address of that person as otherwise designated (Section 821.8(e)).

In the underlying case, on September 16, 1987 the Administrator of the Federal Aviation Administration issued an Order of Suspension (App. D) which suspended the Airline Transport Pilot certificate of Petitioner John C. Pritchard. As is allowed within the provisions of Section 609 of the Federal Aviation Act (49 U.S.C. Section 1429(a)), Pritchard appealed the FAA Administrator's

suspension order to the National Transportation Safety Board.

In a March 11, 1988 filing with the National Transportation Safety Board (App. G), provided in accordance with Board rules 821.6 and 821.7(f) (49 C.F.R. Sections 821.6 and 821.7(f)), Kevin W. Daisey provided notice of his designation as the representative of John C. Pritchard in all matters pending before the Board. Daisey's notice further informed the Board of Daisey's designation to receive all service on behalf of Pritchard (Section 821.8) in accordance with Board rule 821.7(f)(49 C.F.R. Section 821.7(f)) (App. H).

On April 28, 1988, a hearing was held before an administrative law judge of the National Transportation Safety Board. There, the law judge issued an Oral Initial Decision and Order affirming the FAA Administrator's Order of Suspension. In her order the law judge found that, irrespective of the fact that Board rules (49 C.F.R. Section 821.32) place the 'burden of proof' upon the FAA Administrator, once an incident is established "we have to find that there is negligence or carelessness involved" unless convincing evidence to the contrary is brought forth by the accused. And after an appeal to the full National Transportation Safety Board, perfected on June 9, 1988 by the filing of an appeal brief in accordance with Board rule 821.48(a) (49 C.F.R. Section 821.48(a)), in an order adopted on November 1, 1989 the full National Transportation Safety Board affirmed the law judge's Oral Initial Decision and Order with its own Opinion and Order (EA-3024) (App. C).

In a December 13, 1989 telephone inquiry to the office of the Board's chief counsel concerning the status of the pending case, representative Daisey

learned that the National Transportation Safety Board had adopted Order EA-3024 with respect to the appeal to the Board by the petitioner here, John C. Pritchard (App. F). Daisey also learned that the Board had mistakenly failed to serve its order upon him as was provided for and required by Board rules. And Daisey requested to be provided with a copy of the Board's order for the purposes of evaluating further appeal or court review. At Daisey's request the Board staff provided Daisey with a copy of the Board order by regular, not certified, mail. And Daisey received that order on or about December 19, 1989. No other service by the Board had been properly attempted on Petitioner Pritchard or representative Daisey (App. F).

On January 19, 1990, after necessary research and inquiry, and in accordance with the provisions of the Federal Aviation Act (49 U.S.C. Section 1486), Petitioner Pritchard served his Petition for Review on the Board and mailed it to the Court of Appeals for the Ninth Circuit. The petition was filed by the court on January 24, 1990. Pritchard's Petition for Review was filed on the forty-third (43rd) day after service of the Board's order was first attempted on Pritchard by the December 13, 1989 mailing to representative Kevin Daisey. And thus, under Board rule 821.64, entry of the Board's order occurred on December 13, 1989.

In a May 10, 1990 Motion to the court of appeals, the National Transportation Safety Board, represented by counsel for the FAA Administrator, sought dismissal of Pritchard's Petition for Review on the grounds that Pritchard's petition was untimely. The Board claimed that Pritchard's petition was not filed until the sixty-first (61st) day after entry of the Board's order where service had been indicated by a typewritten date notation at the top of

the order rather than the date on which the Board had actually served its order on Pritchard in accordance with Board rules (49 C.F.R. Sections 821.7(f) and 821.8). The Board noted the service date as November 24, 1989, irrespective of the fact that the Board's records indicated that Daisey had not been served on Pritchard's behalf at that time. And other than the typewritten notation which was provided prior to the printing of the Board's Order, there was no record or claim of service before December 13, 1989. And at no time was there any record of mail service by certified mail to representative Daisey as is required by Board rules (49 C.F.R. Section 821.8(a)).

On June 5, 1990 the court of appeals granted the Board's Motion to Dismiss (App. A) citing Petitioner Pritchard's failure to demonstrate reasonable grounds to extend the 60 day statutory period. And on June 27, 1990 the court of appeals denied (App. B) Petitioner Pritchard's Motion to Reconsider the dismissal wherein Pritchard cited the statutory and regulatory provisions which confirmed the timeliness of his Petition for Review.

REASONS FOR GRANTING THE WRIT

The court of appeals departed from a very basic rule of administrative law in dismissing Pritchard's Petition for Review. Where, in *Accardi v. Shaughnessy* (347 U.S. 260 (1954)) this Court set a standard whereby a federal agency may not depart from the rules and policy which it has established, the court of appeals allowed just such a departure from agency regulations in setting the date of entry of the Board's order in the underlying case.

I. THE NATIONAL TRANSPORTATION SAFETY BOARD IMPERMISSIBLY DEPARTED FROM THE PROVISIONS OF BOARD RULES IN SETTING THE DATE OF ENTRY OF ITS ORDER.

Orders of the National Transportation Safety Board, and of the Administrator of the Federal Aviation Administration, are subject to review by the United States Court of Appeals. And the provisions of the Federal Aviation Act (49 U.S.C. Section 1486(a)) set a statutory time limit for the filing of a petition for review with the appeals court. The Act provides that a petition for appeals court review must be filed within sixty (60) days of the date of entry of the order in question.

The Rules of Practice of the National Transportation Safety Board (49 C.F.R. Section 821.64) specify that "[t]he date of entry the Board Order is the date on which the order is served". And thus, "[r]egulations with the force and effect of law supplement the bare bones of [the Federal Aviation Act]" (*Accardi v. Shaughnessy,* 347 U.S. 260) Entry of a Board order does not occur until service is accomplished.

The Board's Rules of Practice do not stop with a simple definition of the date of entry, and Board rules specifically go on to require that service of Board orders is to be made by certified mail (49 C.F.R. Section 821.8(a)) to the person designated to receive service (49 C.F.R. Section 821.8(a)) at the address of the designated person as was specified and provided to the Board in accordance with the provisions of Board rule 821.7(f) (49 C.F.R. 821.7(f)). Accordingly, when date of entry "...is based upon a defined procedure, even though generous beyond the requirements that bind such agency, that

procedure must be scrupulously observed" (*Vitarelli v. Seaton,* 359 U.S. 535 at 547 (1959), concurrence of Justice Frankfurter citing; *Service v. Dulles,* 354 U.S. 363 (1957)).

In this case, Petitioner Pritchard did not receive service of the Board's final order until after the mailing of that order on or about December 13, 1989 (App. F) when it was mailed to his representative, Kevin Daisey. Only then is there any evidence to show that the order was sent to the address which Daisey specified in the notice he provided the Board in accordance with the Board's rules (49 C.F.R. Section 821.7(f)). And although the Board may argue that service was made prior to that point, as arbitrarily indicated in a typed notation at the top of the Board's printed Order (EA-3024), by the Board's own rules the typed notation meant nothing when no actual mailing to Petitioner Pritchard took place and no record of mailing by certified mail exists which would verify fulfillment of the Board's rules of practice (49 C.F.R. Section 821.8(a)). Certified mail would have no other purpose than to provide a record of proper service of the Board's order, and thus protect the procedural rights of parties to Board proceedings.

The Board sought and gained dismissal of Petitioner Pritchard's petition for review of the Board's order based upon its arbitrary typed notation regarding service. The Board noted that the filing of Pritchard's Petition for Review in the appeals court did not occur until, what the Board calculated to be, the "sixty first" day after the Board's entry of its order. However, to reach this conclusion, the Board entirely ignored its regulations and procedures for setting the date of entry of its orders. And where, by the Board's rules, entry of its order (EA-3024) was accomplished on or

after December 13, 1989, in setting of the date of entry of the order for the purposes of seeking dismissal of Pritchard's Petition for Review, the Board used the capricious typed notation specifying service on November 24, 1989 rather than the actual date that the order was served to representative Daisey in accordance with other Board rules and policy.

In *United States v. Heffner*, 420 F.2d. 809 (1970), the Court of Appeals for the Fourth Circuit cited the Court's *Accardi Doctrine* (supra) in reversing a tax fraud case. The Fourth Circuit noted that in both *Accardi* (supra) and *Yellin v. United States* (374 U.S. 109 (1963)) the Court "vacated government actions and remanded for new determinations consistent with the established procedures even though the Court doubted that these procedures would lead to a different result" (*Heffner*, supra at 813). In the present case, however, the result would be different. Pritchard would be afforded the opportunity for review of the Board's order by the court of appeals, an opportunity he has to this point been denied. And Pritchard "should at least have the chance given him by the regulations" (*Yellin v. United States*, supra at 121,. Thus, the Court's *Accardi* Doctrine should govern. And the Board should be required to follow the regulations which it has established.

II. THE COURT OF APPEALS WRONGLY DISMISSED PRITCHARD'S PETITION FOR REVIEW, AS UNTIMELY, WHEN THAT PETITION WAS FILED WITHIN THE TIME LIMIT ESTABLISHED BY STATUTE AND REGULATION.

The Federal Rules of Appellate Procedure governing the date of entry of judgments of the

appeals court are substantially different from the rules governing the date of entry of orders by the National Transportation Safety Board. While the Rules of Appellate Procedure (F.R.A.P. Rule 36) direct that judgments of the appeals court are entered at the point in time that a notation of a judgment is made in the docket, the Board's Rules of Practice (49 C.F.R. Section 821.64) state that "[t]he date of entry of the Board Order is the date on which the order is served" (App. H). However, in this case, the appeals court erroneously accepted a simple typed notation on the record rather than any proof or claim that service was made in accordance with Board rules.

As discussed above, Board rules specify that the date of entry of a Board order is the date of service by the Board (49 C.F.R. Section 821.64). The date of service is the date of mailing (49 C.F.R. Section 821.8(h)) of the Board's order by certified mail to all parties (49 C.F.R. Section 821.8(a)). And Board rules go on to require that where a person has been designated to receive service in accordance with 49 C.F.R. Section 821.7(f), as in this case (App. G), service of Board orders must be made to that person (49 C.F.R. Section 821.8(d)) at the address of that person as designated (49 C.F.R. 821.8(e)). Thus, when service upon Petitioner Pritchard did not occur until on or after December 13, 1989 (App. F), entry of the Board's order did not occur until at least that time. However, even then, the Board's order was not properly served by certified mail when the Board's rules required it. And thus, by the Board's own rules (49 C.F.R. Section 821.8(a)), service and entry of the Board's order has yet to be properly completed.

In a recent review of Section 1006 (49 U.S.C. Section 1486(a)) the Court of Appeals for the District

of Columbia observed that "[a]lthough statutory time limitations on judicial review of agency action are jurisdictional, selfevidently the calendar does not run until the agency has decided a question in a manner which reasonably puts aggrieved parties on notice" (*National Air Transport Association v. McArtor*, 866 F.2d. 483 at 485 (D.C. Cir. 1989)). Given the argument that the meaning and intent of the applicable statute and rules were fulfilled by the Board's December 13, 1989 mailing, the Federal Aviation Act (49 U.S.C. Section 1486(a)) provides that the Board's order shall be subject to review upon a petition filed within sixty (60) days from the date of entry of the Board's order. Thus, under the provisions of the Board's Rules of Practice (49 C.F.R. Section 821.64), Pritchard's Petition for Review was due to be filed by February 12, 1990. And the record shows that Pritchard's petition was timely in that it was filed in the court of appeals on January 24, 1990 (App. E), within the time limit set by the Federal Aviation Act and as defined by the Board's Rules of Practice.

Here, the statute and regulations are not in conflict. "Regulations with the force and effect of law supplement the bare bones of [the Federal Aviation Act]" (*Accardi v. Shaughnessy*, 347 U.S. 260 at 265 (1954)). Where the Board, by its regulation, provided a method to set the date of entry of its orders, the Board "must scrupulously observe rules, regulations, or procedures which it has established" (*United States v. Heffner*, 420 F.2d. 809 at 811 (Fourth Cir. 1970)). Petitioner Pritchard "is at least entitled to have the [Board] follow its rules and give him consideration according to the standards it has adopted in [its Rules of Practice]" (*Yellin v. United States*, supra at 121).

Instead, in its Motion to Dismiss, the Board

asked the court of appeals to sanction a different method for setting the date of entry of its order, a manner similar to that specified for the entry of judgments by the court of appeals. And the court of appeals impermissibly issued its own order dismissing Pritchard's petition based upon the arbitrary date of entry which the Board set by its simple typed notation rather than that set by regulation and Board policy. "An executive agency must be rigorously held to the standards by which it professes its action to be judged" (*Vitarelli v. Seaton*, 359 U.S. 535 at 546, concurrence of Justice Frankfurter (1959)).

The Board's failure to serve its order upon Pritchard's representative barred the tolling of time until service was properly made on or after December 13, 1989 (*McLouth Steel Products v. Thomas*, 838 F.2d. 1317 at 1323 (D.C. Cir. 1988)) since, by the Board's rules, the date of entry of its order was the date of service. And the date and method of service were clearly set forth to be accomplished in a manner which was also provided for by the Board's Rules of Practice. Service was not accomplished under the Board's rules before December 13, 1989, if even then. And regardless of the fact that the Board imposed upon itself procedures and standards which were more rigorous than the statute, so long as the regulations remained unchanged, the Board could not proceed without regard to them (*Service v. Dulles*, 354 U.S. 363 at 388 (1957)).

The petition here has arisen through a disturbing set of circumstances wherein Pritchard petitioned the court of appeals to review an Order of the National Transportation Safety Board due to the wholly arbitrary and capricious fashion in which the Board affirmed the suspension of Pritchard's

Airline Transport Pilot certificate. In the underlying case Pritchard was denied *'due process'* under the law, and the suspension order was affirmed using an entirely capricious standard. Then, when the Board sought dismissal of Pritchard's Petition for Review, the Board again ignored Captain Pritchard's *'due process'* rights when it arbitrarily set the date of entry of its order contrary to the provisions of Board regulations. "Certainly the rights created by the [Board's] rules cannot be that illusory" (*Yellin*, supra at 123). Subsequently, the court of appeals improperly applied its own standards for the setting of the date of entry of the Board's order when the Board's own rules already addressed the issue. It was a matter within the purview of the Board's regulation. And since there has been no record of certified mailing produced by the Board which, had service been accomplished in accordance with Board rules (49 C.F.R. 821.8(a)), should have been available, "...it follows that under the *Accardi Doctrine* petitioner's dismissal cannot stand" (*Service v. Dulles*, supra at 388).

In *Vitarelli v. Seaton* (supra at 540) the Court warned agencies that "...scrupulous observance of departmental procedural safeguards is clearly of particular importance". And in regard to the setting of the date of entry of the Board's order, the improper manner in which the date was set, and the subsequent dismissal of Pritchard's Petition for review by the court of appeals, this Court has taken a broader view in noting that "[t]he history of liberty has largely been the history of observance of procedural safeguards" (*McNabb v. United States*, 318 U.S. 322 at 347 (1943)). Here, the National Transportation Safety Board has circumvented the procedural safeguards established within its own regulations. And the court of appeals has violated

the standards which the Court provided for guidance in *Accardi v. Shaughnessy* (supra).

CONCLUSION

Pritchard's Petition for a writ of certiorari should be granted. The order of the court of appeals dismissing Pritchard's Petition for Review should be vacated. And the case should be remanded to the court of appeals for further proceedings in light of the Court's direction in *Accardi v. Shaughnessy*.

Respectfully submitted,

August 16, 1990

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PETITIONER PRO SE

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD,	)	FILED
	)	June 5, 1990
Petitioner,	)	
	)	
vs.	)	No. 90-70041
	)	
NATIONAL TRANSPORTATION SAFETY BOARD,	)	Order
	)	
Respondent.	)	
	)	

Before: CANBY, WIGGINS, and TROTT, Circuit Judges.

The panel finds that the petitioner has failed to demonstrate that reasonable grounds exist to extend the 60-day statutory period for filing a petition for review. Accordingly, the motion to dismiss this petition for lack of jurisdiction is granted. All other pending motions are denied as moot.

MoCal 6/1/90
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APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD,	)	FILED
	)	June 27, 1990
Petitioner,	)	
	)	
vs.	)	No. 90-70041
	)	
NATIONAL TRANSPORTATION SAFETY BOARD,	)	Order
	)	
Respondent.	)	
	)	

Before: CANBY, WIGGINS, and TROTT, Circuit Judges.

Petitioner's motion for reconsideration is denied.

MoCal 6/25/90
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APPENDIX C

SERVED: November 24, 1989

NTSB Order No. EA-3024

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

JAMES B. BUSEY, Administrator, Federal Aviation Administration, Complainant,	)	
v.	)	DOCKET
JOHN C. PRITCHARD, Respondent.	)	SE-8665

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order issued by Administrative Law Judge Joyce Capps on April 28, 1988 at the

conclusion of an evidentiary hearing. _1/ The law judge found carelessness in respondent's operation of an L-IOII commercial aircraft after landing at Kansas City International Airport on January 19, 1986. While taxiing the aircraft to the gate, respondent allowed the right main landing gear to leave the taxiway, enter the mud and strike a taxiway light. Applying the facts presented at the hearing which were "not contested at all," the law judge found that respondent was careless in: 1) his choice of taxiway egress; 2/ and 2) not making the turn "as safely as it could have been."

Respondent has filed a "brief" (75 pages plus 5 pages of errata) which challenges the law judge's ruling on two preliminary motions and also raises these two arguments: 1) the first officer shared responsibility for the incident by failing to "keep watch" on his side of the aircraft during the turn; 2) the airport operator and/or ground control failed to warn respondent that the taxiway he selected did

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1/ An excerpt from the hearing transcript containing the initial decision is attached.

2/ Respondent landed on runway 27 and exited on C-7 high speed taxiway. Ground control instructed respondent to "taxi to ramp;" the most direct route to his destination; however, was taxiway D-6, which was temporarily closed. Respondent elected to take taxiway B and turned on Taxiway B-10, a turn of 135 degrees. B-10, designed for traffic landing on runway 09, also did not have a centerline.

not meet FAA Airport Design Standards for his category aircraft. _3/

We find no reversible error in the law judge's rulings on respondent's preliminary motions to change venue or bifurcate hearing. Respondent had filed his motions because he and most of his witnesses were "based" in (or closer to) Los Angeles than Kansas City, the proposed venue. However, in response, the Administrator noted, inter alia, the following: all of his (the Administrator's) witnesses lived in Kansas City; respondent actually resided in Texas, not California; respondent failed to identify where his witnesses actually resided, (as opposed to where they were "based"); respondent waited 5 months after receiving notice of the Administrator's preference for Kansas City before registering his opposition. Section 821.37(a) of the Board's Rules mandates that, "due regard shall be given to the convenience of the parties with respect to the place of the hearing." 49 C.F.R. Section 821. That venue in Kansas City may have resulted in greater financial burden to respondent, does not necessarily mean that respondent was not given his "due regard." From the argument offered by the Administrator in opposition to the motion, notably the absence of specific residences for respondent's witnesses, it is clear that the law judge had a reasonable basis on which to rule.

3/ FAA Advisory Circular 150/5 300-12 sets out minimum dimensions for taxiway width, edge safety margin, fillet configuration, shoulder width and safety area width. Respondent contends that the fillet should have been 75 feet and was actually 25 feet, and that the 15-foot edge margin was not maintained for his category aircraft; the FAA concedes the latter.

Respondent's appeal of the law judge's decision not to grant summary judgment also fails. Several issues of material fact were in dispute at the time of the hearing, including respondent's central argument concerning the taxiway design. We do not see how the law judge could have decided the case without first resolving these questions of fact.

Respondent next seeks to exculpate himself by raising the shared responsibility of his first officer for the incident. We are not convinced. Because of the design of the L-1011 (taxi controls accessible only in the left seat, better visibility in the right seat), respondent maintains that he had to rely on the first officer to "keep watch" on the right-side of the aircraft. To accomplish the 135 degree turn attempted by respondent, this contention may in fact be true. However, respondent presented scant evidence on his actual direction to the first officer. Respondent testified only that the first officer's duty was "a general" one and that he was briefed on respondent's intentions. 4/ Furthermore, it is unclear from the testimony of respondent's expert just how much better the first officer's view really was. [See Tr. at 158-60.] We distinguish respondent's "reliance" on his first officer in this case from that in Coleman and Thomas, two cases where we have held that a captain can rely upon the first officer's oral characterization of a radio

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4/ Law Judge Capps: "What did you say to the first officer? You said you discussed it. Tell me about the discussion.
Respondent:...We briefed the fact that 1 was going to enter...utilizing Bravo 10.... Now, to the exact verbance that was used and to what extent that transpired, ...I can't say exactly what happened. But that was a general." [Tr. 127]

transmission. Administrator v. Coleman, 1 NTSB 289 (1968) and Administrator v. Thomas, 3 NTSB 349 (1977). Not only as pilot-in-command but as the pilot operating the aircraft, it was respondent's duty to require clearing assistance from his crew, ground control or ground guides. The responsibility for the consequences of respondent's failure to do so rests solely with him.

We do not find established, however, the alleged "imprudence" of respondent in passing up 90 degree turns for one requiring a 135 degree turn. That there were other more accommodating egresses available, or that B-10 was designed for other traffic, do not alone mean that respondent's decision was unsafe or even "imprudent." Rather, it was respondent's lack of care in accomplishing the turn which mandates affirmation of the Administrator's order. It is on this basis that we reject respondent's central argument concerning deviations from FAA taxiway dimension criteria. Testimony from respondent's expert witness makes plain that respondent could have.easily ascertained the alleged deficiency in the taxiway dimensions and thereby apprehend just how difficult the turn would be. Moreover, the obtuseness of the angle (135 degrees) and the absence of taxiway centerlines were readily apparent; both of these, too, should have alerted respondent of the need to exercise additional care in making the turn.

Respondent's witness acknowledged there was no reason why the turn could not have been made safely. The ATC ground controller also testified that he had observed another L-IOII safely make the turn at night. The weather was clear and the taxiway surface was apparently dry. We can find in the record no evidence that would either tend to exculpate respondent or vitiate the inference of

carelessness made by the Administrator. Therefore, we affirm the law judge's initial decision and order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision and the order of suspension are affirmed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above opinion and order.

APPENDIX D

U.S. Department of Transportation
Federal Aviation Administration

Central Region

Iowa, Kansas, Missouri, Nebraska

601 E. 12th Street
Kansas City, Missouri 64104

In Reply Refer To: ACE-7
86CE630012

Area Code: 816 374-5446

CERTIFIED

September 16, 1987

TO: John C. Pritchard
842 South Highway 46
New Braunfels, TX 78130

ORDER OF SUSPENSION

It appears to the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, on the basis of all information available, that:

1) At all times hereinafter mentioned, you were, and presently are, the holder of Airline Transport Pilot Certificate Number 1983580.

2) On January 19, 1986, you acted as pilot-in-command of Civil Aircraft N702TT, a Lockheed 1011-385-1, desingated as Total Air Flight 116, on a flight from Lamber Field, St. Louis, Missouri, to Kansas City International Airport (MCI), Kansas City, Missouri.

3) After landing on Runway 27, at MCI, N702TT was cleared to taxi to the ramp. While taxiing Flight 116, you allowed the aircraft's right main gear to leave the taxiway, enter the mud, and struck a taxiway light.

4) By reason of the foregoing facts and circumstances, you operated an aircraft in a careless manner, so as to endanger the life and property of others, in violation of Section 91.9 of the Federal Aviation Regulations.

By reason of your violation of the Federal Aviation Regulations, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airline transport pilot certificate.

NOW, THEREFORE, IT IS ORDERED, pursuant to Section 609 of the Federal Aviation Act of 1958, as amended, that your Airline Transport Pilot Certificate Number 1983580 be suspended effective October 11, 1987, and said suspension to continue in force for a period of thirty (30) days thereafter. In the event you fail to surrender your certificate to this office on or before October 11, 1987, said suspension shall continue in effect until thirty (30) days subsequent to your actual surrender thereof.

KENNETH E. GEIER
Regional Counsel

By:

BARBARA BOYLE
Attorney

cc:

Frederick E. Zimring, Esq.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD,	)	FILED
	)	January
Petitioner,	)	24, 1990
	)	
vs.	)	No. 90-70041
	)	
NATIONAL TRANSPORTATION SAFETY BOARD,	)	PETITION
	)	FOR REVIEW
Respondent.	)	
	)	

In accordance with the provisions of the Federal Aviation Act of 1958 (49 U.S.C. Section 1486), John C. Pritchard hereby petitions the Court for review of the final Order of the National Transportation Safety Board (EA-3024) ordering a twenty (20) day suspension of Petitioner's Airline Transport Pilot Certificate, entered by the Board on November 24, 1989 in accordance with the Board's Rules.

January 19, 1990

JOHN C. PRITCHARD
Petitioner.
8601 Falmouth #406
Playa del Rey, CA 90293

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. PRITCHARD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 90-70041
	)	
NATIONAL TRANSPORTATION SAFETY BOARD,	)	Declaration
	)	
Respondent.	)	
	)	

DECLARATION OF KEVIN W. DAISEY

I, Kevin W. Daisey, do hereby declare and certify under the penalty of perjury that the following is true:

1. In the matter of Administrator v. Pritchard (EA-3024, 1989), I served as representative to Captain John C Pritchard during the entire course of the hearing and appeals process before the National Transportation Safety Board. Such representation was accomplished in line with the provisions of Board Rule 821.6(a) (49 C.F.R. Section 821.6(a)).

2. The address of record for service of documents upon Captain Pritchard was provided to the Board in *Respondent's Notice of a Change in Representation*, dated March 11, 1988. That address was my Post Office Box in Honolulu, which I provided in accordance with the provisions of Board Rules (49 C.F.R. 821.7(f)) (SEE: Notice as attached).

3. The proper address for the service of any document to Captain Pritchard was:

KEVIN W. DAISEY
P.O. Box 31115
Honolulu, HI 96820

4. As indicated by reliable telephone records and notes related to the incident, on the morning of December 13, 1989 I received a telephone call from Robert C. Konop. Konop informed me that he had just learned from NTSB staff personnel that an Order had been issued with relation to the appeal of John C. Pritchard to the National Transportation Safety Board. Konop gained this information in a telephone call which he had made to the office of the NTSB Chief Counsel.

5. I had received no information prior to 12/13/89 that any Order had been issued with relation to Pritchard's appeal to the Board. And I had not received any written notice of entry of such order related to Captain Pritchard.

6. After completion of my telephone conversation with Konop, I immediately placed a telephone call to members of the NTSB staff in Washington D.C.. I was then informed that the Board had issued an Order in Captain Pritchard's case, and the Board staff person to whom I spoke

was kind enough to advise me that Pritchard's appeal had been denied.

7. After informing the Board staff person that I was the official representative of Captain Pritchard, as specified by Board Rules, and that I had not received either a copy of the Board's Order, or notice of its issuance, the Board staff person was very apologetic and offered to immediately provide me with a copy of the Board's Order (EA-3024) by mail.

8. I later received a copy of the Board's Order (EA-3024) at the official service address on or about 12/19/89. And I have every reason to believe that it was mailed to me by members of the NTSB staff on, or shortly after, December 13, 1989.

9. I received only one (1) copy of the Board's Order, and that Order, or notice, was not served upon me until December 13, 1989.

The foregoing is true and correct to the best of my knowledge and recollection.

June 9, 1990

By: KEVIN W. DAISEY

APPENDIX G

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON D.C.

Administrator, Federal Aviation Administration,	)	
Complainant,	)	DOCKET No.
vs.	)	SE-8665
John C. Pritchard,	)	
Respondent.	)	Representation Notice

RESPONDENT'S NOTICE OF A CHANGE

IN REPRESENTATION

In accordance with the Rules of Practice in Air Safety Proceedings (49 C.F.R. 821.6), the Respondent does hereby give notice of a change in representation. For the purposes of the proceedings which are now pending, the Respondent has named KEVIN W. DAISEY as his agent and represen-

tative. All service and documents in this case should be served upon the following addressee:

KEVIN W. DAISEY
P.O. Box 31115
Honolulu, HI 96820

Respectfully submitted.

March 11, 1988

KEVIN W. DAISEY
Respondent's Representative

By: ROBERT C. KONOP
Agent

APPENDIX H

STATUTES AND REGULATIONS

FEDERAL AVIATION ACT -

Section 1006(a) (49 U.S.C. Section 1486(a)):

"Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

NTSB RULES OF PRACTICE -

49 C.F.R. Section 821.64:

"Judicial review of a final order of the Board may be sought as provided in section 1006 of the Act (49 U.S.C. 1486) and section 304(d) of the Independent Safety Board Act of 1974 (49 U.S.C. 1903(d)) by filing of a petition for review within 60 days of the date of entry of the Board Order. *THE DATE OF ENTRY OF THE BOARD ORDER IS THE DATE ON WHICH THE ORDER IS SERVED.*" (emphasis added)

49 C.F.R. Section 821.7(f):

"*DESIGNATION OF PERSON TO RECEIVE SERVICE.* The intial document filed shall state on the first page the name and post office address of the person or persons who may be served with documents in the proceedings."

49 C.F.R. Section 821.8(a):

"*SERVICE BY THE BOARD.* The Board WILL SERVE ORDERS, notices of hearing, and written initial decisions upon all parties to the proceeding BY CERTIFIED MAIL. Other documents will be served by certified mail or by regular mail (including U.S. Government franked envelope)."

49 C.F.R. Section 821.8(d):

"*WHO MAY BE SERVED.* Service upon a party or person may be made upon a person designated in accordance with Section 831.7(f) to receive service. If no such person is designated, service may be made upon the party himself, if he is an individual, or upon an officer of a corporation or association, a member of a partnership, or an agent of an air carrier designated under section 1005(b) of the Act."

49 C.F.R. Section 821.8(e):

"*WHERE SERVICE MAY BE MADE.* Service by regular or certified mail shall be made at the address of the person designated in accordance with Section 821.7(f)to receive service, or, if no such

person is designated, at the usual residence or principal place of business of the party, or, if not known, at the address last furnished by him to the Federal Aviation Administration, except that an agent designated by an air carrier under Section 1005(b) of the Act shall be served only at his office or usual place of residence. Service by mail on the Administrator shall be made at the office of his designee to receive service, or if none, at the Federal Aviation Administration, Office of the Chief Counsel, Washington, D.C. 20591. Personal service may be made on any of the persons described in paragraph (d) of this section wherever they may be found, except that an agent designated by an air carrier under section 1005(b) of the Act may be served only at his office or usual place of residence."

Supreme Court, U.S.
FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-308

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN C. PRITCHARD, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
WILLIAM G. COLE
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Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner's petition for review of an order of the National Transportation Safety Board was filed within 60 days of the entry of that order.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-308

JOHN C. PRITCHARD, PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal (Pet. App. 15) is unreported. The decision of the National Transportation Safety Board (Pet. App. 17-22) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1990. The court denied petitioner's "motion for reconsideration" on June 27, 1990 (Pet. App. 16). The petition for a writ of certiorari was filed on August 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Aviation Administration issued an order providing for a 30-day suspension of petitioner's Airline Transport Pilot Certificate. The order was based on the FAA's finding that petitioner, after landing a commercial aircraft at Kansas City International Airport, acted carelessly in allowing the plane's right main landing gear to leave a taxiway, enter the mud, and strike a taxiway light. Pet. App. 23-24.[1] Petitioner appealed to the National Transportation Safety Board. After a hearing, the administrative law judge found that petitioner had violated FAA regulations, but reduced the suspension to 20 days. See Pet. App. 18. Upon review, the NTSB upheld the 20-day suspension. *Id.* at 17-22.[2]

Petitioner, proceeding *pro se*, filed a petition for review of the Board's order in the court of appeals. The court dismissed the petition for review, finding that it had not been filed within the period prescribed by 49 U.S.C. App. 1486(a) for a filing as of right and that petitioner had not shown good grounds justifying an extension of the statutory period. Pet. App.

---

[1] Under applicable regulations, an FAA order of suspension is effective unless appealed to the NTSB. If an administrative appeal is taken, the order of suspension serves as the complaint in an administrative proceeding that includes a hearing before an administrative law judge, followed by an appeal to the NTSB. See 49 C.F.R. 821.30.

[2] Under the Aviation Safety Reporting Program, petitioner will not be required to serve this suspension. Under that program, a suspension is not served if the incident in question does not involve intentional misconduct and is promptly reported to NASA. The violation and penalty do, however, remain a matter of record.

15. Section 1486(a) provides that a petition for review as of right must be filed within 60 days of the entry of an NTSB order; the question presented by this case is when the NTSB's order was "entered" for purposes of this statute.[3]

1. Under the Board's rules, "[t]he date of entry of the Board Order is the date on which the order is served." 49 C.F.R. 821.64. The Board's order upholding petitioner's suspension was marked "SERVED: November 24, 1989" (Pet. App. 17). The Board's records reflect that, on that date, copies of the order were sent by certified mail to petitioner and, as the result of an oversight, to his *former* attorney. The order was mailed to petitioner at the address in New Braunfels, Texas, that his attorney had provided when initiating the appeal of the FAA's order of suspension. Exh. A.[4] The return receipt was returned to the NTSB—executed, on November 28, 1989, in a box entitled "Signature—Agent" by a person other than petitioner. The order was also mailed to Frederick E.

---

[3] Section 1486(a) provides, in pertinent part, that an order of the NTSB

> shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

[4] Documents reflecting the service of the NTSB's order were not part of the record before the court of appeals. We have lodged copies of those documents—and other exhibits cited in this brief—with the Clerk.

Zimring, the attorney who had initiated the appeal of the suspension on petitioner's behalf; the Board received a return receipt executed, on November 27, 1989, in the box entitled "Signature—Agent." Exh. B.

Because the order was mailed to Mr. Zimring, it was not immediately served upon Kevin W. Daisey, a non-lawyer who, in March 1988, had replaced Mr. Zimring as petitioner's designated representative in the NTSB proceeding. See Pet. App. 30. On December 13, 1989, the NTSB's Office of General Counsel received a phone call from Mr. Daisey. Mr. Daisey advised that he had not received a copy of the order in petitioner's case. The NTSB mailed Mr. Daisey a copy of the order by regular mail that day. Exh. C; see Pet. App. 27-29.

2. On January 24, 1990, the sixty-first day after November 24, 1989, the court of appeals received petitioner's *pro se* petition for review. Although the petition was dated January 19, 1990 (Pet. App. 26), it was transmitted to the court by mail and was not received for filing until January 24. Exh. D. Under Fed. R. App. P. 25(a), filings by mail of papers other than briefs and appendices are not timely "unless the papers are received by the clerk within the time fixed for filing." Thus, if the 60-day period for a timely petition for review began to run on November 24, 1989, the date shown on the face of the order, the petition was one day out of time. Petitioner's petition for review indicated that the period for filing had commenced on that date; the petition sought review of "the final Order of the National Transportation Safety Board * * * *entered by the Board on Novem-*

ber 24, 1989 in accordance with the Board's Rules." Pet. App. 26 (emphasis added).[5]

Counsel for the government, unaware of the defect in the service of the NTSB order, moved to dismiss the petition as untimely. Exh. G. In his opposition, petitioner again advised the court that "[o]n November 24, 1989 the National Transportation Safety Board entered its Order * * *." Exh. H, at 5. Petitioner argued, however, that "reasonable grounds" existed for his failure to file his petition within 60 days of that date. He contended that the late filing was attributable to unusual delay in the Postal Service's handling of the petition. *Id.* at 6-8. He also noted that Daisey had not been served with a copy of the order before contacting the NTSB in December of 1989. *Id.* at 6.

3. The court of appeals granted the motion to dismiss the appeal, finding that petitioner had failed to demonstrate that reasonable grounds existed for an extension of the 60-day period for filing a petition for review as of right. Pet. App. 15. Petitioner filed a "motion for reconsideration." For the first time, petitioner argued in this motion that the period for the filing of a petition for review did not commence on November 24, 1989, because the order had not been

---

[5] Until he filed his "motion for reconsideration" in the court of appeals, all of petitioner's filings in the court of appeals stated that November 24, 1989, was the date of the NTSB order's entry. In his docketing statement, petitioner gave "11/24/89" as the "[d]ate of entry of judgment or order"; he represented, incorrectly, that his petition had been filed on "1/19/90"; and he stated, also incorrectly, that the "[l]ast day for filing appeal or petition" was "1/24/90". Exh. E. Petitioner's brief, dated April 18, 1990, stated, "The final Order of the Board in this case was entered on November 24, 1990." Exh. F.

served on Mr. Daisey on that date. Exh. I. The court of appeals denied the motion without calling for a response from the government. Pet. App. 16.

ARGUMENT

In our view, the NTSB's rules provide that an order is not entered until it is served and that, when a party has designated a representative in an NTSB proceeding, service upon the party must be made upon that representative. Under that interpretation, the order at issue here was not served—and thus was not "entered"—until December 13, 1989. The petition for review was filed in the court of appeals within 60 days of that date. Although the record makes clear that petitioner had actual notice of the order in advance of the time he filed his one-page petition for review and placed no significance upon the date on which his representative was served until after his appeal had been dismissed, we do not oppose a grant of the petition, vacation of the court of appeals' judgment, and a remand for further proceedings.

1. As noted, the 60-day period for the filing of a petition for review as of right commences with "the entry of" an NTSB order. Under the Board's rules, "[t]he date of entry of the Board Order is the date on which the order is served." 49 C.F.R. 821.64. Under 49 C.F.R. 821.8(a), the Board is obligated to serve an order "upon all parties to the proceeding by certified mail."

Two provisions speak to the manner in which service is to be made on a party that has designated a representative in the NTSB proceeding. Under 49 C.F.R. 821.8(d), entitled "[w]ho may be served",

"[s]ervice upon a party or person may be made upon a person designated in accordance with § 821.7(f) to receive service"; if no representative has been designated, "service may be made upon the party himself, if he is an individual * * *." The next section of the regulations, 49 C.F.R. 821.8(e), entitled "[w]here service may be made," provides that "[s]ervice by regular or certified mail shall be made at the address of the person designated in accordance with § 821.7(f) to receive service, or, if no such person is designated, at the usual residence or principal place of business of the party * * *." Although the first of these subsections uses the permissive "may," the two subsections read together plainly require service on a party's representative when a representative has been designated.[6] In addition, Section 821.8 (g) indicates that a "presumption of lawful service" upon a party who has designated a representative arises only from receipt of the document at the representative's residence or place of business or from a mailing of a "properly addressed envelope"; a presumption of "lawful service" arises from acknowledgement of receipt at the party's residence or prin-

---

[6] The Federal Aviation Act, 49 U.S.C. 1485(c), does not require service of an order upon a representative when one has been designated. Section 1485(c) provides:

> Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made.

With respect to orders issued in suspension proceedings, however, the pertinent regulations obligate the Board to employ one of the options made available by this statute.

cipal place of business only "[w]here there is no designee." [7]

The notice of Daisey's appointment as petitioner's representative stated that "[a]ll service and documents in this case should be served upon [Daisey]." Pet. App. 31. The NTSB's records reflect that service was not made upon Daisey before December 13, 1989. Accordingly, notwithstanding the date shown on the order, the NTSB order was not "entered"—as that term is defined in the Board's rules—until that date.[8] The petition for review was therefore timely when it was filed on January 24, 1990.

---

[7] Section 821.8(g) provides:

> (g) *Presumption of service.* There shall be a presumption of lawful service in the following instances:
>
> (1) Where acknowledgment of receipt is made by a person who customarily receives mail or receives it in the ordinary course of business at either the residence or principal place of business of a person designated in accordance with § 821.7(f) to receive service; or
>
> (2) Where there is no designee, acknowledgment of receipt at the residence or principal place of business of the party himself, by a person who customarily receives mail or receives it in the ordinary course of business; or
>
> (3) Where a properly addressed envelope, indicating that it had been sent by regular, registered, or certified mail, has been returned marked "undelivered," "unclaimed," or "refused."

Another subsection, 49 C.F.R. 821.8(h), entitled "[d]ate of service," makes clear that the date of mailing (as opposed to receipt) is the date of service. This section does not, however, speak to the question of when service occurs if an order is not sent to the proper person.

[8] We do not suggest that any defect in service would postpone the commencement of the period prescribed by Section 1486(a); there is a difference between service that has occurred but has been defective in some respect and service that has not occurred at all. (It could not be argued, we be-

To be sure, when the court of appeals granted the motion to dismiss, it had nothing before it establishing that the order had been entered on a date other than the one shown, November 24, 1989. Moreover, petitioner repeatedly advised the court of appeals that the date shown was correct, and the record makes clear that petitioner operated on the assumption that this was the date on which the order had been entered. Nevertheless, we do not oppose the granting of the petition, vacation of the court of appeals' judgment dismissing the petition for review as untimely, and a remand for further proceedings. Petitioner was proceeding *pro se*; the government was the party that moved for dismissal in the court of appeals; and, although the government acted in good faith in doing so in light of the terms of the NTSB order and the representations in the petition for review, the documents reflecting the precise manner of service were not within petitioner's possession, but were available to the government.

---

lieve, that sending an order by regular rather than certified mail would postpone the running of the 60-day period—although it might, under appropriate circumstances, give rise to "reasonable cause" for an extension of the period.) In this case, however, the Board's records reflect that petitioner's representative—the person the regulation requires to be served—was not served at all until December 13.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment of the court of appeals dismissing the appeal as untimely should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
WILLIAM G. COLE
Attorneys

NOVEMBER 1990

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